



**NextGen Committee Webinar:
Criminal Law Issues Media Lawyers Need to Know**

Hosted by:
Pepper Hamilton LLP
May 24, 2017

Pepper Hamilton LLP
Attorneys at Law

Overview

- **Introduction**
- **Reporting on Protests & Public Events**
- **Recording Calls & Conversations**
- **Obtaining Classified or Confidential Information**
 - **Protecting Reporters**
 - **Defending Sources & Whistleblowers**
- **What Happens If...? Grand Juries & Investigations**
- **Courtroom Issues & Prior Restraints**
- **Conclusion**

Reporting on Protests & Public Events

Recent Events

MEDIA

Felony Charges for Journalists Arrested at Inauguration Protests Raise Fears for Press Freedom

By JONAH ENGEL BROMWICH JAN. 25, 2017



Anti-Trump protesters being pepper-sprayed in Washington on Jan. 20.
Jewel Samad/Agence France-Presse — Getty Images

At least six journalists were charged with felony [arrested](#) while covering the violent protests that President Trump's inauguration parade in Washington, D.C. according to police reports and court documents.

Journalist faces charges after arrest while covering Dakota Access pipeline protest



ADVERTISEMENT

Journalist Jenni Monet reports from an Oct. 27 sweep during a mass demonstration over the Dakota Access pipeline in Morton County, North Dakota. (Photo courtesy of Jenni Monet)

By **Sandy Tolan**

FEBRUARY 5, 2017, 6:40 PM



journalist arrested in a broad sweep of a “rogue” protest camp near the Standing Rock reservation is facing criminal charges from North Dakota authorities.

Recent Events

PostEverything • Perspective

I was arrested for asking Tom Price a question. I was just doing my job.

I wasn't trying to make news. I was trying to report it.



By Dan Heyman May 16 at 6:00 AM [Follow @PNS_WV](#)

Dan Heyman is a reporter for the Public News Service based in Charleston, W.Va.

West Virginia reporter arrested after trying to ask Tom Price a question



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West Virginia reporter arrested after trying to ask Tom Price a question



IN THE MAGISTRATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

Case No. _____

v.

HEYMAN, DANIEL RALPH

Defendant

Address

Social Security No.

Driver's License No.

Date of Birth

Misdemeanor
 Felony

CRIMINAL COMPLAINT

I, the undersigned complainant, upon my oath or affirmation, state the following is true and correct to the best of my knowledge and belief On or about 05 / 09 / 17 in KANAWHA County, West Virginia, in violation of W.Va. Code (cite specific section, subsection, and/or subdivision as applicable) 61-6-19(a) Willful Disruption of Governmental Processes the defendant did (state statutory language of offense)

If any person willfully interrupts or molests the orderly and peaceful process of any department, division, agency or branch of state government or of its political subdivisions, he or she is guilty of a misdemeanor

I further state that this complaint is based on the following facts: On 5-9-17 while providing security for the Special Counsel to the President of the US, Kellyanne Conway and Secretary Price of Federal Health and Human Services the above defendant was aggressively breaching the secret service agents to the point where the agents were forced to remove him a couple of times from the area walking up the hallway in the main building of the Capitol. The defendant was causing a disturbance by yelling questions at Ms.

Overview of the Rules

- The Supreme Court has never established the extent of reporters' First Amendment rights to report on public events:
 - *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972): “Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”
 - *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978): The “First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”
- Reporters do not have greater rights than members of the public to gather information.

Practice Points

- Develop a Plan & Train Your Newsroom
- Be Familiar with Local Criminal Law Procedure
 - Make sure you have counsel on-call
 - Have contact information for the DA's Office & the Police Civil Affairs Division
- Publishing/Uploading on the Go
 - Consider how to protect reporters' work product
 - Develop a plan for publication in event of arrests
- Legal Recourse?

Recording Calls & Conversations

Recent Events

Politics LONG ISLAND

Suffolk man gets \$50G settlement in videotaping arrest

Updated May 11, 2017 8:24 PM

By David M. Schwartz david.schwartz@newsday.com

 Reprints  [A+](#) [A-](#)



Thomas Demint, right, said he was arrested May 21, 2014, for obstruction of justice and resisting arrest after recording the arrests of his friends a year ago by Suffolk County police in Center Moriches, shown above in a video frame grab. Photo Credit: Attorney for Thomas Demint; Ed Betz

Recent Events

REPUBLICANS

Officials consider charges against woman who infiltrated GOP retreat, identity revealed



By Chad Pergram · Published February 02, 2017 · Fox News



Donald J. Trump

@realDonaldTrump

Following

James Comey better hope that there are no "tapes" of our conversations before he starts leaking to the press!

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Overview of the Rules

- Most courts, with some exceptions, have found a right for the press and ordinary citizens to record police activity.
 - *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)
 - *Smith v. City of Cummin*, 212 F.3d 1332, 1333 (11th Cir. 2000)
 - *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)
- The exceptions to this rule have stemmed from cases involving citizens, rather than journalists.
- Additional cases are making their way through the Circuit Courts.
 - *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)
 - *Smith v. City of Cummin*, 212 F.3d 1332, 1333 (11th Cir. 2000)
 - *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)

State Wiretap Statutes

- There are twelve two-party consent states:
 - California
 - Connecticut
 - Florida
 - Illinois (superseded by case law)
 - Maryland
 - Massachusetts
 - Michigan
 - Montana
 - Nevada
 - New Hampshire
 - Pennsylvania
 - Washington

Practice Points

- Know the Tools Your Reporters are Using and Your State Wiretap Statute
 - Audio recordings versus video
 - Facebook Live, WhatsApp, and other mediums
- Consider Choice of Law Issues
 - Assume the strictest state's wiretap law applies
- Be Aware of Potential Invasion of Privacy Claims

Obtaining Classified, Illegal, or Confidential Information

Recent Events – Hacked Materials

NPR ombudsman WITH ELIZABETH JENSEN

2016: OMBUDSMAN'S ANALYSIS

How Should NPR Report On Hacked WikiLeaks Emails?

October 19, 2016 - 2:51 PM ET
Commentary



My office has spent many recent hours responding to readers and listeners who believe NPR has not covered, or covered enough, the ongoing release of hacked emails allegedly taken from Democratic presidential candidate Hillary Clinton's campaign chairman, John Podesta. In fact, NPR has covered the content of the emails fairly extensively (and that coverage has brought its own complaints from listeners and readers who believe the email revelations are relatively unimportant compared to other issues bubbling up in the presidential race, or policy discussions column is a little different: Are there ethical reasons avoided covering them?

As an [online NPR story noted](#), "WikiLeaks on Saturday released a large tranche of emails allegedly linked to Hillary Clinton's campaign chairman, John Podesta, bringing the total to more than 11 million emails in the last eight days." As it painstakingly combs through the data, it has published or aired 11 stories that touched on the issue. Five were online-only and six on-air, either during the mo-

FOURTH ESTATE

Oui, Journalists Should Report on Hacked Emails

The job of the press is to 'tell the truth as we find it, without fear of consequences.'

By JACK SHAFER | May 08, 2017

Sony calls on media to stop publishing hacked documents



Sony is asking news organizations to destroy emails or other Sony documents, which they describe as "stolen informaton." (Frederic J. Brown / AFP/Getty Images)

Recent Events – Reporters

Comey Memo Says Trump Asked Him to End Flynn Investigation

By MICHAEL S. SCHMIDT MAY 16, 2017



Alone in the Oval Office, Mr. Trump began the discussion by condemning leaks to the news media, saying that Mr. Comey should consider putting reporters in prison for publishing classified information, according to one of Mr. Comey's associates.

Mr. Trump then turned the discussion to Mr. Flynn.

Fox News Reporter May Face Criminal Charges for Reporting on the CIA

The government will use any and all information at its disposal to find journalist sources, as shown in [The Washington Post's report this morning](#) on a Department of Justice investigation into Fox News chief correspondent James Rosen, who may face criminal charges for reporting government secrets.

Sessions Leaves Door Open To Prosecuting News Organizations Over Leaks

Trump's Justice Department is reportedly considering charging WikiLeaks, raising concerns mainstream outlets could be next.

By Michael Calderone, Ryan J. Reilly



INTER



Buy Now



Recent Events – Sources



DAILY BEAST

PHOTO ILLUSTRATION

THE HUNTED

Justice Department: We Are Ready to Find and Prosecute Leakers

The Department of Justice is making it clear it's had no intention on prosecuting those who are spilling secrets.



Jason Chaffetz: Leakers need to go to jail

MORE VIDEOS

THE RUSSIA INVESTIGATION

WaPo: Senior WH Adviser is 'Person of Interest' in Russia Probe

abc NEWS.COM

HOUSE WATCHDOGS ON THE RAMP

PRESIDENT GIVES MAJOR SPEECH IN SAUDI ARABIA

THE POWERHOUSE ROUNDTABLE!

COULD RUSSIA PROBE THREATEN OUR DEMOCRACY?

YouTube



Donald J. Trump
@realDonaldTrump

Following

I have been asking Director Comey & others, from the beginning of my administration, to find the LEAKERS in the intelligence community.....

Overview of the Rules

- The Espionage Act
 - What's the Law?
 - What's the Risk for Reporters?
 - What's the Risk for Sources?
- *Bartnicki v. Vopper*, 532 U.S. 514 (2001)

The Espionage Act, 18 U.S.C. § 794

- Elements
 - With intent or reason to believe information will be used to the injury of the U.S. or advantage of a foreign nation
 - Defendant “communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit”
 - Any “document, writing, ... photograph, ... plan, ... or information relating to the national defense”
 - To a foreign government, unrecognized faction or military force, or a representative, agent, or citizen thereof, either directly or indirectly
- Conspiracy
 - Two or more conspire and one or more effects the object
- Penalty

Practice Points – Reporters

- Hacked Documents
- Illegally-Obtained Information
- Drop-Boxes and the *Bartnicki* Line

Practice Points – Whistleblowers & Sources

- Criminal Liability
 - Stolen information
 - Criminal Activity
 - Impact on Immunity
- Civil Liability
- Employment Effects
 - Termination
 - Non-Disclosure Agreements

What if it isn't Just Talk? Dealing with Investigations

Grand Jury Subpoenas – Reporters & Press

NEWS

Grand jury presentment: AG Kane lied, attempted to cover up leak

BRAD BUMSTED | Monday, April 27, 2015, 10:44 a.m.



Attorney General Kathleen Kane was charged Thursday Aug. 6, 2015, with crimes including leaking investigative material to a Philadelphia newspaper, lying to a grand jury about her actions and attempting to cover up the leak.

POLITICS | A REPORTER JAILED: THE OVERVIEW

Reporter Jailed After Refusing to Name Source

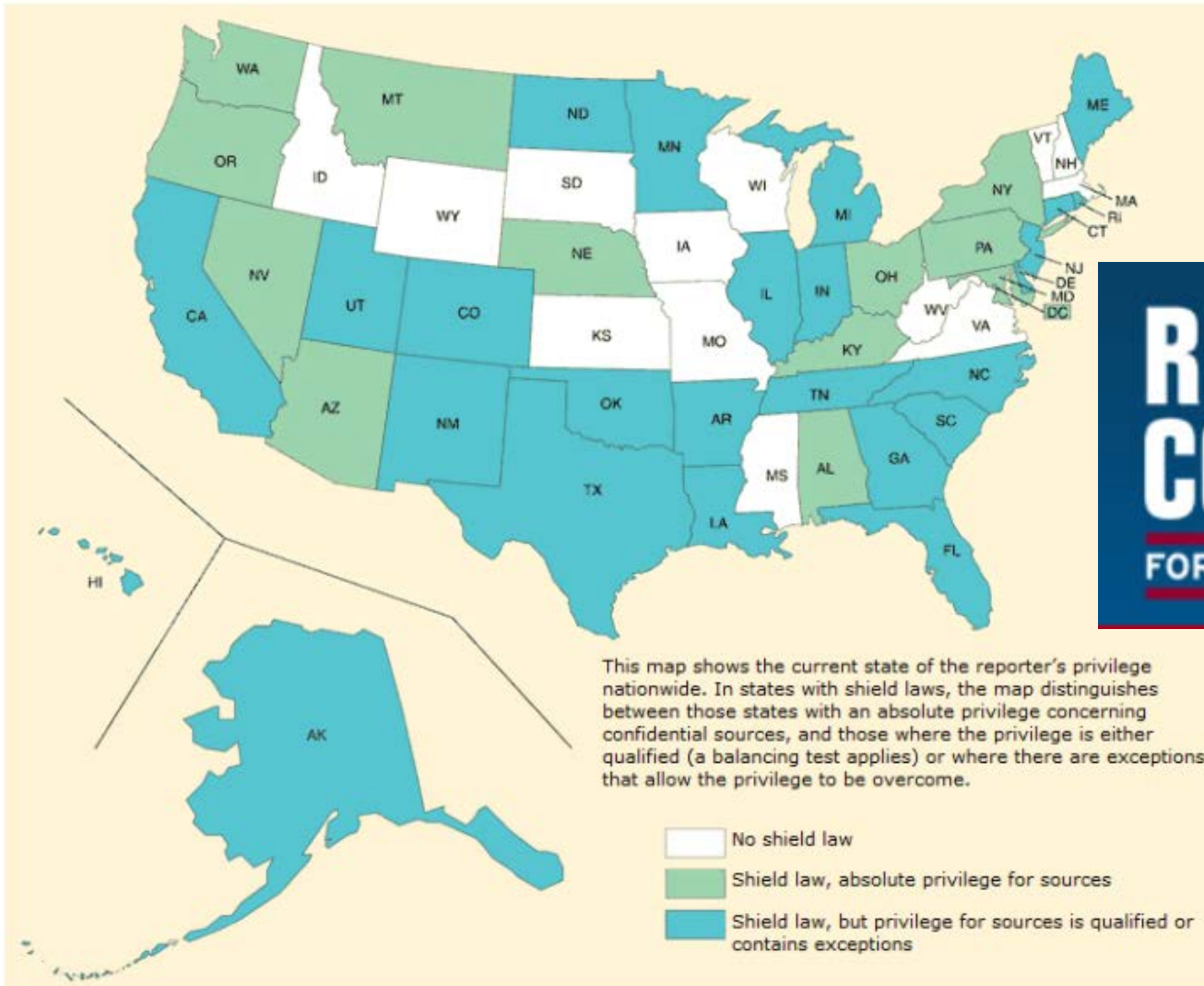
By ADAM LIPTAK | JULY 7, 2005

WASHINGTON, July 6 - Judith Miller, an investigative reporter for The New York Times, was sent to jail on Wednesday after a federal judge declared that she was "defying the law" by refusing to divulge the name of a confidential source.

Another reporter who faced jail in the case, Matthew Cooper of Time magazine, was spared after announcing a last-minute deal with a confidential source that he said would allow him to testify before a grand jury.

Overview of the Rules – Know Your Shield Law

Shield laws and protection of sources by state



Practice Points

- Reporters & Content Subpoenas
- Source Subpoenas
 - Target or Witness?
 - Testify or Plead the Fifth?
 - Degrees of Immunity

Courtroom Restrictions & Prior Restraints

Recent Events

Local NBC reporter facing jail time for violating judge's courtroom rules during 'Bachelor' Chris Soules' hearing

Published May 16, 2017 - Associated Press



IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-46-CR-3932-2016
VS :
WILLIAM HENRY COSBY, JR. :

DECORUM ORDER GOVERNING JURY SELECTION

AND NOW this 3rd day of May 2017, after consultation with the President Judge of Allegheny County, the District Court Administrators of Allegheny and Montgomery Counties, the Allegheny County Sheriff, and the Administrative Office of Pennsylvania Courts the following Order is entered.

2017 MAY -3 PM 3:29

Elizabeth Amanieh KWWL
about 6 months ago

Overview of the Rules

“Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. . . It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets.”

Richmond Newspapers v. Virginia, 448 U.S. 555, 581 n.18 (1980)

Practice Points

- Ask reporters about courtroom decorum orders before big trials
- Consider whether to intervene in advance of the trial
- Develop a coverage plan & discuss the boundaries of reporters' behavior under the order

Conclusion: Q&A

Presenters

People

Capabilities

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Locations

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OVERVIEW EXPERIENCE INSIGHTS

Kaitlin M. Gurney is an associate with Pepper Hamilton LLP, resident in the Philadelphia office. Ms. Gurney is a member of the Commercial Litigation Practice Group, and focuses her practice on media law, complex commercial disputes, and white collar criminal defense.

Ms. Gurney represents newspapers and other media companies in defending lawsuits alleging defamation and invasion of privacy. She also provides advice to reporters and editors on a variety of issues affecting the newsroom, including access to courtrooms and documents.

In other cases, Ms. Gurney has worked for corporations and universities involved in breach of contract and intellectual property disputes. She also has represented pharmaceutical and health care companies in government investigations and litigation involving claims of fraud and abuse.

Ms. Gurney also worked as a reporter for *The Philadelphia Inquirer* for more than six years, focusing on government, politics and environmental issues. As a reporter in the newspaper's Trenton bureau, she covered New Jersey Governors Jon S. Corzine, Richard D. Codey, and James McGreevey. She also worked for the *Charlotte Observer* and the *Raleigh News & Observer*.

EDUCATION

J.D., *magna cum laude*,
Temple University Beasley
School of Law, 2009,
note/comment editor,
Temple Law Review
B.A., Journalism and
American Studies,
University of North Carolina
(Chapel Hill), 2000

BAR ADMISSIONS

Pennsylvania

COURT ADMISSIONS

U.S. District Court, Eastern
District of Pennsylvania

CLERKSHIPS

Hon. Paul S. Diamond: U.S.
District Court, Eastern
District of Pennsylvania,
Philadelphia, PA

PRACTICE AREAS

Commercial Litigation
Media, Communications and
Entertainment
First Amendment and
Transparency Practice
Fraud and Abuse Litigation
and Investigations



Presenters

JACQUELYN N. SCHELL

Bryan Cave LLP

Ms. Schell's commercial litigation focuses on the defense of media companies and private clients in defamation, First Amendment, and Communications Decency Act litigations. She also represents media clients in affirmative actions to obtain access to government materials.

In Ms. Schell's white collar and investigations practice, she has defended companies and individuals under investigation by U.S. Attorneys' Offices, District Attorneys' Offices, the Securities and Exchange Commission, and other regulatory agencies. She also conducts internal corporate investigations and audits.

Prior to joining Bryan Cave, Ms. Schell served as a Special Assistant District Attorney in the Cobb Judicial Circuit, where she obtained several successful jury verdicts and negotiated plea agreements for both white collar and violent crimes.

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